

What is the practical application and implications of the genuineness tests for applicants across all tiers?

Sophie Barrett-Brown
Laura Devine Solicitors
@LauraDevineLaw

*“a fair, transparent and **objective** system which enables potential migrants to assess their likelihood of making a successful application”*

Home Office, 2008

*“Refusals on this basis are **subjective**”*

Tier 1 (Entrepreneur) Modernised Guidance,
December 2016

Genuineness Tests - Overview

- **Tier 1 (Entrepreneur)** – genuine entrepreneur test [Jan 2013, Apr 2015]
- **Tier 1 (Investor)** – source/control of funds [Nov 2014]
- **Tier 1 (General)** – genuine earnings [Oct 2013]
- **Tier 2 sponsor licence** applications
 - genuine attempts to recruit
 - ability to offer genuine employment
- **Tier 2 (General), (ICT)** – genuine vacancy test [Nov 2014]
- **Tier 2 (Minister of Religion)** – genuine intention to undertake role [Oct 2013]
- **Tier 4 (General)** – genuine intention to study [July 2012]
- **Tier 5 (Temporary Worker)** – genuine intention to undertake role [Oct 2013]

Tier 1 (Entrepreneur): Genuine Entrepreneur Test - Initial

Rules 245DB(f)-(h) (k)-(n) , 245DD(h)-(j) (m)-(p)

ECO/SOS must be satisfied that:

- applicant genuinely intends and is able to establish, take over or become a director of business(es) in UK within 6 months;
- applicant genuinely intends to invest the money in this business; and
- the money is and will remain genuinely available to the applicant (until spent for the purposes of the business); and
- if relying on previous investment, have genuinely invested in a genuine business in UK
- applicant does not intend to take employment in the UK other than under the terms specified for this category.

Tier 1 (Entrepreneur): Genuine Entrepreneur Test – Initial

Decision maker will assess balance of probabilities and may take into account:

- evidence submitted by applicant
- viability and credibility and source of money
- viability and credibility of business plans and market research into chosen business sector
- applicant's previous educational and business experience (or lack thereof)
- applicant's immigration history and previous activity in UK
- for leave to remain only, where already registered as self-employed/director in the UK, whether any mandatory accreditation/registration/insurance obtained
- any other relevant information

Tier 1 (Entrepreneur): Genuine Test Extensions/ILR

Rules 245DB(i)-(n), 245DD(k)-(p), 245DF(f)-(k)

ECO/SOS must be satisfied that applicant:

- established, taken over or become a director of UK business(es) and has genuinely operated that business(es) while they had leave as a Tier 1 (Entrepreneur);
- genuinely invested the money in UK business(es) to be spent for the purpose of that business(es);
- genuinely intends to continue operating UK business(es);
- does not intend to take employment other than under the terms of the category (not apply to ILR).

Tier 1 (Entrepreneur): Genuine Test Extensions/ILR

ECO/SOS will assess on balance of probabilities and may take into account:

- evidence submitted;
- viability and credibility of source of money;
- credibility of financial accounts;
- credibility of business activity in UK, including when had leave as a Tier 1 (Entrepreneur)/Business Person/Innovator;
- credibility of the job creation;
- whether any mandatory accreditation/registration/insurance obtained;
- any other relevant information.

Tier 1 (Entrepreneur): Genuine Entrepreneur Test

Modernised guidance - suggested evidence

- CV/business plan/any market research (if business in infancy) to assess how much consideration applicant has put into starting up
- evidence of appropriate accreditation/registration/insurance
- financial information overseen by a bank, eg. small business loan
- hierarchy charts of larger business
- evidence of advertising
- contracts showing trading
- tax documentation (eg. returns/registration with HMRC)
- affidavit from any mentors eg. by member of British Business Angels Association
- evidence of previous businesses owned by applicant
- details of trading premises/permissions if trading in own home
- evidence of job creation

Tier 1 (Entrepreneur): Genuine Entrepreneur Test

Rules

- caseworker may ask for further information/evidence (refuse if not received within 28 days) or invite for interview
- may not carry out assessment if falls for refusal on other grounds (but reserve right to do so on any reconsideration)

Modernised guidance

- English - must provide interpreter if applicant wants/needs
- must provide interview notes if requested by applicant or representative

Tier 1 (Investor): “Reasonable Grounds”

Rules - 245EB(E) and 245ED(g)

ECO/SOS must not have reasonable grounds to believe that:

- notwithstanding the specified evidence provided, applicant is not in control and at liberty to freely invest funds;
- funds were obtained (by applicant or third party) by means that are/would be unlawful in the UK;
- character, conduct or associations of a party providing the funds are such that approving application is not conducive to public good.

Tier 1 (Investor): “Reasonable Grounds”

Modernised Guidance

- Example scenarios which may raise reasonable doubts:
 - applicant gifted funds by third party accused of serious fraud in home country;
 - applicant currently a domestic worker for a third party who intends to base themselves in UK and will remain in third party’s employment if approved under Tier 1 (Investor);
 - checks show funds held by applicant are likely to be proceeds of criminal activities.
- Examples may not result in refusal in all cases – each application must be judged on the specifics of individual case;
- Refusal letter must fully explain evidence/information which lead to reasonable doubts.

Tier 1 (General)

Rules – Appendix A – 19(i)-(k)

SOS must be satisfied earnings are from genuine employment:

- will assess on balance of probabilities;
- may take into account:
 - evidence submitted;
 - whether appears earned through genuine employment, rather than borrowed, gifted, otherwise shown in financial records without being earned;
 - whether business can be shown to exist and be lawfully and genuinely trading;
 - verification of previous earnings claims with declarations made to other government departments (including previous applications);
 - previous education or business experience;
 - immigration history and previous activity in the UK;
 - whether any mandatory accreditation/registration/insurance obtained;
 - any payments to other parties;
 - any other relevant information.

Tier 2 (General)/(Intra Company Transfer): Genuine Vacancy

Rules - Appendix A - 74H-I & 77H-J

- No points will be awarded (notwithstanding required evidence provided) if ECO/SOS has reasonable grounds to believe that:
 - the job is not a genuine vacancy;
 - the applicant is not qualified to do job;
 - the job requirements stated in the COS and in any advertising are inappropriate and/or have been tailored to exclude residence workers from being recruited (Tier 2 (General) only)
- May request additional evidence information – refuse if not received within 10 days (NB reduced from 28).

Tier 2 (General)/(Intra Company Transfer): Genuine Vacancy

Paragraph 6 – definition of “genuine vacancy”

- requires the jobholder to undertake the specific duties and responsibilities, for the weekly hours and length of the period of engagement, described in the CoS; and
- does not include dissimilar and/or unequally skilled duties such that the SOC code used in the CoS is inappropriate.

Tier 2 (General)/(Intra Company Transfer): Genuine Vacancy

Modernised Guidance

A genuine vacancy is one which:

- requires jobholder to perform specific duties and responsibilities for job and meets all requirements of Tier 2 (General)/(ICT) (short or long term staff) for duration of vacancy shown on COS; and
- does not include dissimilar and/or lower skilled duties and must not have been tailored to exclude suitable qualified or skilled settled workers.

Examples of vacancies that are not considered to be genuine include:

- one which contains an exaggerated or incorrect job description to deliberately make it appear to meet requirements of Tier 2 (General)/Tier 2 (ICT) short or long term staff category when does not;
- a job that does not exist, in order to enable a migrant to come to/stay in UK;
- advertisements with requirements that are inappropriate for job and have been tailored to exclude resident workers from being recruited.

Tier 2 (General)/(Intra Company Transfer): Genuine Vacancy

Modernised Guidance

Examples of "particular cause for concern":

- applicant has been working for employer and job vacancy was not advertised;
- job description appears to be a standard/template response used for other businesses and is in a high risk sector;
- applicant is switching from a route that has been identified as high risk, eg. Tier 1 (Post Study Worker) or Tier 4 student.

Tier 2 (Minister of Religion)

Rules – 245HB (m)-(p), 245HD (q)-(u)

ECO/SOS must be satisfied that migrant:

- genuinely intends to undertake, and is capable of undertaking, the role on the COS
- will not undertake employment other than under the terms of the category

ECO/SOS may

- request additional information/evidence (28 days)
- request interview

Tier 2 (Minister of Religion)

Guidance

Will base decision on balance of probabilities and may take into account:

- knowledge of the role;
- relevant experience relative to skills required to do role;
- knowledge of the sponsor;
- explanation of how recruited;
- any other relevant information.

Modernised Guidance

Not need to take these actions for most applicants only do so when:

- sponsor assigning large number of COS relative to size of organisation;
- job description indicates mainly non-pastoral duties;
- intelligence suggests linked to extremism/ terrorism/trafficking.

Tier 4 (General)

Rules 245ZV(k) & 245ZX(o)

- Applicant must be a genuine student
- Applicant must, if required to do so on examination or interview, be able to demonstrate, without assistance of an interpreter, English language proficiency of a standard to be expected from an individual who has reached the standard specified in the CAS

Tier 4 (General): Genuine Student

Guidance

- Applicant may be asked to undertake an interview, either in person, or on telephone. If Home Office not satisfied applicant is a genuine student, application may be refused.

Modernised guidance

- Before granting application, caseworker must be satisfied that applicant is a genuine student. Applicant's responsibility to prove this. Caseworker must consider all aspects of application taking into account any relevant factors. Includes education provider's decision to issue a CAS.
- Refusals on this basis are subjective and a detailed refusal letter, as well as a transcript of interview (if applicable), must support any decision. These documents will be important in any appeals so they must set out reasons for refusal as fully and clearly as possible.

Tier 5 (Temporary Worker)

Rules – 245ZO(f), 245ZQ(k)

Applicant must:

- genuinely intend to undertake, and be capable of undertaking, role stated on the COS; and
- not undertake employment in the UK other than that stated on COS.

ECO/SOS may:

- request additional information and evidence, and refuse application if not provided; and
- request applicant attends an interview, and refuse application if applicant fails to comply without reasonable explanation.

Tier 5 (Temporary Worker)

Guidance

- When making assessment, caseworker may take into account applicants:
 - knowledge of role;
 - relevant experience or skills needed to do role;
 - knowledge of UK sponsor;
 - explanation of how recruited;
 - any other relevant information.

Modernised Guidance

- Caseworker should only request this when:
 - sponsor assigning unusually large number of COS for same role type;
 - reasonable grounds to suspect applicant will not be working in role described in COS;
 - job description on COS is unusual for sub-category applicant is applying under;
 - intelligence suggests applicants are linked to extremism, terrorism or trafficking.

Remedies

- Administrative review
- Fresh application
- Judicial Review

What is the practical application and implications of the genuineness tests for applicants across all tiers?

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Laura Devine Solicitors
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